Supreme Court, U.S.
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No. 07-531

In The
Supreme Court of the United States

JEFF GEORGE,

Petitioner,

v.

AERO LODGE 735,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 17, 2007

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QUESTIONS PRESENTED FOR REVIEW

Did not the United States Courts of Appeals for the Sixth Circuit err in holding that a labor union of which the plaintiff is a member could under no circumstances as a matter of law be an "employer" for purposes of the Family and Medical Leave Act of 1993 ?

RULE 14.1[b] SATEMENT

A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Jeff George.

Defendant-Appellee and Respondent: Aero Lodge 735

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY THE COURTS

The Opinion of the United States Court of Appeals for the Sixth Circuit dated July 26, 2007 (a *per curiam* Opinion by Circuit Judges Keith and Griffin and District Judge Van Tatenhove, sitting by designation) was not recommended for full-text publication and is not reported.

The Order granting the defendant/respondent's motion to dismiss for failure to state a claim upon which relief can be granted dated October 18, 2006 is likewise unreported.

CONCISE STATEMENT OF THE BASIS FOR UNITED STATES SUPREME COURT JURISDICTION

This is a direct appeal from a result obtained in a United States Court of Appeals. Consequently, the United States Supreme Court has jurisdiction by virtue of 28 USC ¶ 1254.

STATUTES AND REGULATIONS INVOLVED IN THE CASE, *verbatim*

29 USC ¶ 2611[4][A][ii][I]

[4] Employer.

[A] In general. The term "employer"—

[i] means any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

[ii] includes –

[I] any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

29 CFR ¶ 825.104[a]
[redacted]

[a] An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer...

29 CFR ¶ 825.220[a][3]
[redacted]

All persons (whether or not employers) are prohibited from discharging any person (whether or not an employee) because that person has...

CONCISE STATEMENT OF THE CASE

This is a true case of first impression in which the facts of this case are entirely undisputed.

The United States District Court for the Middle District of Tennessee had jurisdiction over the instant controversy by virtue of the federal Family and Medical Leave Act of 1993, which is codified at 29 USC §§ 2601 *et seq*. The Sixth Circuit had jurisdiction over this controversy by virtue of Mr. George's appeal being a direct appeal as of right within the meaning of Rules 3 and 4 of the Federal Rules of Appellate Procedure.

United States District Judge Nixon dismissed Mr. George's Complaint for failure to state a claim upon which relief can be granted. The facts as alleged must be taken as true as a matter of law.[1]

Jeff George was an hourly worker at Vought Aircraft Industries, Inc. and was a member of the defendant union. In 1985, Mr. George suffered a back injury which, over time, became chronic in nature. He alleges that the defendant labor union willfully and intentionally failed to make those accommodations for him as required by the FMLA in that it did not adequately investigate and act upon his medical and workplace difficulties. As a result, Mr. George insists that he was deprived of front pay and benefits of employment, and he suffered other economic damage.

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[1] *Klimas c. Comcast Cable Communications, Inc.*, 465 F.3d 271 at 276 (6th Cir. 2006). Further citations omitted.

REASONS FOR GRANTING THE PETITION AND ARGUMENT

It is pertinent to note, again, that the issue of whether or not a labor union can, as a matter of law, be the "employer" of a union member who is paid by some entity other than the union for FMLA purposes is a question of first impression. Neither the United States Supreme Court nor any federal circuit court of appeals has spoken to the matter, even indirectly. Rule 10[c] of the Rules of The United States Supreme Court expressly refers to "...an important question of federal law that has not been, but should be, settled by this Court...". That is PRECISELY the situation here.

Since the allegations in Mr. George's complaint must be taken as true, we must first seek statutory guidance in resolving the matter.

Both the United States Code and the Code of Federal Regulations define "employer" for FMLA purposes as "...any person acting, directly or indirectly, in the interest of a covered employer...". There was no dispute in the courts below that the union is a "person" as defined. So, ultimately, the inquiry devolves to this: is a labor union that intentionally and willfully fails to investigate a member's FMLA claims acting "directly or indirectly in the interest" of the worker's direct employer?

Since there is no guidance in the case law, we must rely on the plain meaning rule of statutory

construction.[2] Mr. Justice Holmes' justly famous aphorism – "I don't care what the intention was. I only want to know what the words mean"[3]- must serve as our lodestar. The only purpose of a labor union is to represent the interests of its members as those interests may appear. Invariably, that duty creates an adversarial relationship between the union and those entities that employ its workers. Where, as here, a union intentionally fails in its duty, that union must necessarily be acting as that which is tantamount to an alter ego of the direct employer. Words have meaning. In the narrow context of the undisputed facts before this the District Court and the Sixth Circuit, the meaning of the words is clear.

Of equal clarity is the language of the commentary included in 29 CFR ¶ 825.105: "Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act" Here, there can be no question of Vought's knowledge of the Respondent's wrongdoing. This requirement is entirely consistent with 29 CFR ¶ 825.220[a][1], which makes it crystal clear that any entity deemed an "employer" is in FMLA violation if it interferes with an exercise or attempt to exercise an FMLA-given right; here, the Respondent labor union

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[2] *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 at 241 (1989).

[3] As quoted by Mr. Justice Frankfurter in *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev., no. 4, pps. 527-546 (May 1947).

withdrew the Petitioner's grievance, as plain an interference as could be envisioned.[4]

The analysis used by the both Judge Nixon and by the Sixth Circuit created a distinction without a difference. In concluding that the union could not be Mr. George's employer for FMLA purposes, both courts below tacitly ignored the plain meaning of 29 CFR 825.220[a][3]:

> "all persons (whether or not employers) are prohibited from discharging any person (whether or not an employee) because that person has..." .

CONCLUSION

This case presents an issue of substantial importance that has never been decided. Under the narrow circumstances presented by this particular case, the defendant/respondent labor union was acting as Jeff George's employer for FMLA purposes. The plain meaning of the words both in Title 29 itself and in the Code of Federal Regulations[5] will admit of no other result.

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[4] It is important in context to recall that the FMLA supersedes any purportedly contrary provision[s] of the Collective Bargaining Agreement. 29 CFR ¶ 825.700[a].

[5] CFR regulations always have the force of law. *Johnson v. City of Detroit*, 446 F.3d 614 at 630 (6th Cir. 2006).

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No 06-6363

[Filed July 26, 2007]

JEFF GEORGE, Plaintiff-Appellant,

v.

AERO LODGE 735, Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

ORDER

Before: KEITH and GRIFFIN, Circuit Judges; VAN TATENHOVE, District Judge.*

* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

Jeff George, a Tennessee litigant proceeding through counsel, appeals a district court judgment dismissing his civil rights complaint filed under 42 U.S.C. § 1983. The parties have expressly waived oral argument, and we agree unanimously that oral argument is not needed. Fed. R. App. P. 34(a).

George was an hourly worker at Vought Aircraft Industries, Inc ("Vought"), and a member of the International Association of Machinists and Aerospace Workers, Aero Lodge 735, a labor union ("the Union"). In 1985, George injured his back, resulting in chronic back pain. Because of his chronic back ailment, George's work attendance became irregular. As a result, his employment was terminated on June 4, 2003. George sought redress against Vought, and the dispute between the parties settled in 2005.

The instant action against the Union seeks relief under the Family and Medical Leave Act of 1993 ("FMLA"), for violations actionable under § 1983. In the complaint, George claims that the Union violated the FMLA when it intentionally and willfully failed and refused to accommodate his medical condition. The Union filed a motion to dismiss arguing: 1) that it is a labor union and not an employer as that term is defined under the FMLA; and 2) that George's complaint is time-barred. The district court determined that the Union was not an employer as defined by the FMLA and dismissed the complaint. George's subsequent motion to alter or amend the judgment was denied. This appeal followed.

We review de novo a district court's dismissal of a complaint for failure to state a claim under Fed. R.

Civ. P. 12(b)(6). *Thurman v. Pfizer, Inc* , 484 F.3d 855, 859 (6th Cir. 2007). The court must construe the complaint in a light most favorable to the plaintiff and accept all well-pleaded factual allegations as true. *Id.* Dismissal is proper only if it is clear that the plaintiff could present no set of facts consistent with his allegations that would entitle him to relief. *Id.*

Upon review, we conclude that the district court properly dismissed the complaint because the Union is not an employer within the meaning of the FMLA. The FMLA protects an employee from adverse action as a result of his taking leave for a serious medical condition. The Act states that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(l). The FMLA grants employees a right of action "against any employer" for violations of the act, 29 U.S.C. § 2617(a)(2), and George was employed by Vought, not by the Union. Pursuant to 29 U.S.C. § 2611(4)(A)(ii)(I), the term "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." Whether an entity qualifies as an employer for purposes of the FMLA depends on a number of factors, such as: (1) whether or not the employment took place on the premises of the alleged employer; (2) how much control the alleged employer exerted on the employees; and (3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition of the employees. *See Wascura v. Carver,* 169 F.3d 683, 685-87 (11th Cir. 1999) (discussing § 2611(4)(A)(ii)(I) and drawing on case law that interprets identical language in the Fair Labor

Standards Act (FLSA)); *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995) (interpreting identical language in the FLSA); *Riordan v. Kempiners*, 831 F.2d 690, 694-95 (7th Cir. 1987) (same).

After applying the foregoing factors to the instant case, we hold that the Union is not an employer within the meaning of § 2611(4)(A)(ii)(i). George did not work on the Union's premises, and his work was not controlled by the Union. Moreover, as noted by the district court, "[e]ven though the union's role may have included trying to influence the company to hire, fire, and change work conditions in the employee's favor, it did not have the power to do so directly, and therefore it is not an employer." (Memorandum Order at p. 4).

In this regard, our conclusion is consistent with the construction of other federal employment statutes. Statutes that permit actions against labor organizations specifically provide for suits against labor organizations *in addition to* suits against employers. *See, e.g.*, 42 U.S.C. § 2000e-2(c) (unlawful labor organization practices are distinct from unlawful employer practices under Title VII); 42 U.S.C. § 1211(2) (labor organizations are expressly included in the definition of a "covered entity" within the meaning of the ADA). In contrast the FMLA is silent regarding labor organizations. Because the Union is not George's employer within the meaning of the FMLA, the Union's motion to dismiss was properly granted.

Accordingly, the district court's judgment is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ _____

Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE
NASHVILLE DIVISION

No 3-06-0477

[Filed August 29, 2006]

JEFF GEORGE,	)
Plaintiff,	)
	)
v.	)
	)
AERO LODGE 735,	)
Defendant.	)
	)

MEMORANDUM ORDER

Before the Court is a Motion to Dismiss and accompanying Memorandum filed by Defendant Aero Lodge 735 (Doc. Nos. 4, 5) and Plaintiff Jeff George's Response thereto (Doc. No. 9). For the reasons stated herein, the Court hereby GRANTS Defendant's motion.

I. BACKGROUND

This case arises out of Plaintiffs termination fiom his job at Vought Aircraft Industries, Inc., while a

member of the Defendant Aero Lodge 735, a labor union. (Doc. No. 1 at 2.) In 1985, Plaintiff suffered a serious injury to his back, the symptoms of which became chronic. *Id.* The symptoms caused Plaintiff to attend work irregularly. *Id.* Plaintiff was terminated on June 4, 2003, and sought redress against Vought Aircraft Industries. *Id.* Plaintiffs dispute with Vought settled, as evidenced by this Court's Order of August 24, 2005 in Docket Number 3:04-0417 (RE 19). *Id.*

On May 12, 2006, Plaintiff filed a complaint in this Court against Defendant International Association of Machinists and Aerospace Workers, seeking relief under the Family and Medical Leave Act of 1993 ["FMLA"] for violations actionable under 42 U.S.C. § 1983. (Doc. No. 1 at 1.) Aero Lodge No. 735 filed a Motion to Dismiss (Doc. No. 4) on behalf of Defendant, and by Order of the Court the Defendant was officially changed to Aero Lodge 735 (Doc. No. 13). Plaintiff seeks economic damages in the amount of $300,000.00 along with reasonable attorney fees as provided by law, and reasonable discretionary expenses of litigation.

II. LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure "tests whether a cognizable claim has been pleaded in the complaint." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). In considering a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff's factual allegations are accepted as true. *See Wallin v. Norman*, 317 F.3d 558, 561 (6th Cir. 2003). A motion to dismiss for failure to

state a claim upon which relief can be granted must be viewed in the light most favorable to the non-moving party. *See id.* "In order for a dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint." *Bower v. Fed. Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996).

III. DISCUSSION

In his complaint, Plaintiff asserts that Defendant violated the FMLA by intentionally and willfully failing and refusing to accommodate Plaintiff's medical condition. (Doc. No. 1 .) Defendant's Motion to Dismiss contests the FMLA claim on two grounds: first, that the Defendant is a labor union and thereby not an employer under the FMLA, and second, that the statute of limitations has lapsed. The Court agrees that the Defendant labor union is not an employer and cannot be sued under the FMLA, and therefore grants the Defendant's Motion to Dismiss.

A. The Defendant Labor Union Is Not an Employer as Defined by the FMLA

The FMLA protects employees from unlawful employment practices of employers by entitling employees to take reasonable leave for medical reasons. The language of the FMLA clearly applies only to employers. The Act states that "[I]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a).

The Defendant labor union is not an "employer." As defined by the Act, an "employer" is any person who employs 50 or more employees or who possesses the power to control the employee in question at work. 29 U.S.C. § 2611(4)(A). There is also a stipulation in the law that "any person who acts, directly or indirectly, in the interest of a covered employer" is an employer for FMLA purposes. 29 U.S.C. § 2611(4)(A). Plaintiff alleges that because Defendant did not adequately represent his interests, it was acting in the interest of the covered employer and thereby should be considered an employer. (Doc. No. 9 at 2.) The Court rejects this reasoning. The purpose of a labor union is to represent the employee's interests, not the employer's. *See Eckert v. United Automobile Workers, Local Union 897*, 2005 WL 2126295 at *10 (W.D.N.Y. Sept. 1, 2005) (holding that a labor union is not an employer). Inadequate representation of an employee's interest does not mean that the union has begun to represent the employer instead of the employee.

Additionally, factors considered by courts in determining whether an entity is in control of the employee in the work place are: (i) whether employment took place on the premises of the alleged employer; (ii) the degree of control the alleged employer exerted on the employee; and (iii) whether the alleged employer had the power or authority to fire, hire, or modify the employment conditions of the employee. *Morrison v. Magic Carpet Aviation*, 383 F.3d 1253, 1255 (11th Cir. 2004) (citing *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995)). In *Morrison*, the court ruled that an important client is not an employer. Even though the client may have been able to influence hiring and firing decisions, because it did

not actually have the power to hire or fire the employee or directly control his work place or work assignments, it could not have been an employer. *Id.* at 1256-1257.

Likewise, the labor union in this case meets none of these three criteria and therefore should not be considered an employer. Plaintiff did not work on the union's premises, and he was not controlled in his work by the union. Even though the union's role may have included trying to influence the company to hire, fire, and change work conditions in the employee's favor, it did not have the power to do so directly, and therefore it is not an employer.

Also, it is appropriate to regard the FMLA as excluding labor unions from its definition of "employers" because "[o]ther statutes that permit actions against labor organizations do so not by including unions within the definition of employer, but by specifically providing for suits against labor organizations *in addition to* suits against employers." *Eckert*, 2005 WL 2126295 at *9 (emphasis in the original). *See, e.g.*, 42 U.S.C. § 2000e-2 (unlawful labor organization practices are distinct from unlawful employer practices under Title VII); 42 U.S.C. § 12111(2) (labor organizations are expressly included in the definition of a "covered entity within the meaning of the ADA). The FMLA is silent as to labor organizations, and thus the Court does consider labor organizations as an "employer" as defined by the FMLA.

B. The Statute of Limitations on a Willful FMLA Claim Has Not Lapsed

As to the second reason that the Defendant proffers on which to base judgment as a matter of law against the Plaintiff's FMLA claim, the Court does not agree that the statute of limitations has lapsed. The statute of limitations on an FMLA claim is two years from the last event constituting a violation of the FMLA, unless the violation was willful, in which case the statute of limitations is extended to three years. 29 U.S.C. §§ 2617(c)(l)-(2). The Complaint was filed by the Plaintiff on May 12, 2006, two years and eleven months after the Plaintiff was discharged on June 4, 2003. (Doc. No. 1 .) On a motion to dismiss for failure to state a claim upon which relief can be granted Plaintiff's factual allegations are accepted as true. *Wallin*, 317 F.3d at 561. The Complaint alleges that the Defendant "intentionally and willfully failed and refused to accommodate Plaintiff's medical condition" in violation of the FMLA. (Doc. No. 1 at 2.) As such, it is a question for the jury whether or not the violation was willful and therefore whether the statute of limitations has lapsed or not. Therefore, the Court will not dismiss the case on these grounds, but on the grounds that suit alleging a violation of the FMLA cannot properly be brought against this Defendant, as it is not an employer.

IV. CONCLUSION

The Court hereby GRANTS Defendant's motion to dismiss claims against Aero Lodge 735. Plaintiff cannot bring an action against the Defendant under the FMLA because the Defendant is not an employer,

as defined by the Act. As such, Plaintiff's claims against Aero Lodge 735 must be dismissed.

It is SO ORDERED.

Entered this the 29th day of August, 2006.

/s/
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No 06-6363

[Filed September 4, 2007]

JEFF GEORGE,	)
Plaintiff-Appellant	)
	)
v.	)
	)
AERO LODGE 735,	)
Defendant-Appellee	)
	)

MANDATE

Pursuant to the court's disposition that was filed 07/26/07 the mandate for this case hereby issues today.

COSTS: NONE

Filing Fee	$
Printing	$
Total	$

[stamp]

A True Copy

Attest:
Leonard Green, Clerk

By /s/_____
Deputy Clerk